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No. _____

In The

Supreme Court of the United States

October Term, 1986

RUBEN TREVINO AND RACHAEL TREVINO, HUSBAND AND WIFE, INDIVIDUALLY AND AS GUARDIANS AD LITEM OF SOPHIA TREVINO, A MINOR,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals' misapplication of *United States v. United States Gypsum Co.* mandates review in order to insure proper present and future implementation of Rule 52(a), *Federal Rules of Civil Procedure?*

II. Whether the Court of Appeals applied standards of review not permitted by this Honorable Court under applicable federal law to conclude that the Trial Court's findings were clearly erroneous?

A. Whether the Trial Court's finding of $2,000,000 non-pecuniary damages in favor of the minor Plaintiff was under applicable federal law clearly erroneous?

B. Whether the Trial Court's finding of $400,000 non-pecuniary damages in favor of the parents of the minor plaintiff was under applicable federal law clearly erroneous?

C. Whether the Trial Court's finding that the minor plaintiff needs care and attention by a nurse assistant (attendant care) for five hours per day for the balance of her life at $7.00 per hour current cost was under applicable federal law clearly erroneous?

D. Whether the Trial Court's finding of a —2% discount rate in computing the present value after-tax of the pecuniary damages was under applicable federal law clearly erroneous?

III. Whether the Trial Court, in reducing the pecuniary awards to present value after-tax, abused its discretion by including the years 1974-1982 in its comparison of the historical relationship between changes in wages and medical costs and changes in interest rates on tax-free securities?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners Ruben Trevino, et al, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit made and entered November 28, 1986.

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OPINIONS BELOW

The Judgment and the Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Washington are currently unreported. They are copied in the Appendix ["App."] at App.1-19.

The Opinion of the United States Court of Appeals For the Ninth Circuit is *Trevino v. United States*, 804 F.2d 1512 (9th Cir. 1986). A copy is at App. 20-36.

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JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its Judgment and Opinion on November 28, 1986. Petitioners' timely filed Motion for Rehearing was overruled January 27, 1987 [App. 37].

The statutory provision conferring jurisdiction to review the Judgment in question is 28 USCA § 1254(1).

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STATUTORY AND RULE PROVISIONS INVOLVED

28 USCA § 1346(b):

> "(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred . . ."

28 USCA § 2674:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages . . ."

Rule 52(a), *Federal Rules of Civil Procedure:*

> ". . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses, . . ."

STATEMENT OF THE CASE

This is a Federal Tort Claims Act case in which the Trial Court awarded a total of $6,332,504 in non-pecuniary and pecuniary damages to Petitioners because of negligent

obstetrical care provided by the United States. The Trial Court had jurisdiction pursuant to Title 28 USCA § 1346 (b) and § 2671, *et seq.*

Ruben and Rachael Trevino, filed suit on their own behalf and as guardians *ad litem* of their minor child Sophia Trevino. The cause of action arose from the treatment given to Rachael Trevino and Sophia Trevino during Rachael Trevino's labor and delivery of Sophia Trevino on November 3, 1981, at Madigan Army Medical Center in Tacoma, Washington. Sophia Trevino sustained unquestionable and tragically severe injuries including brain damage, mental retardation, cerebral palsy involving all four extremities with atonic quadriparesis, and a seizure disorder [for a full description of Sophia Trevino's injuries, see FF 39, 43 and 62, App. 9, 12-14].

Based on findings of fact [FF 64, 68, 83, App. 14, 17], the Trial Court awarded Sophia Trevino $2,000,000 damages for mental anguish and pain and suffering, which includes the destruction of her ability to enjoy life [CL 8, App. 18].

Based on findings of fact [FF 72 and 77, App. 15], the Trial Court awarded Ruben and Rachael Trevino as a marital community $200,000 for the loss of love and companionship of their child, and $200,000 for the injury to, or destruction of, the parent-child relationship, which includes parental grief and mental anguish and suffering [CL 9, App. 18-19].

The Trial Court awarded Sophia Trevino pecuniary damages which reduced to present value after-tax amounted to $3,932,504 [CL 7, App. 18].

Respondent's motion for a new trial or amended findings of fact, conclusions of law, and judgment, was denied by the Trial Court.

Respondent appealed to the United States Court of Appeals for the Ninth Circuit. On appeal, Respondent did not contest liability for Petitioners' injuries but asserted that the record and applicable law cannot support the award of $6,332,504.

By Opinion filed November 28, 1986, the Court of Appeals modified the Trial Court's Judgment in part, reversed in part and remanded as follows: the award of $2,000,000 to Sophia Trevino for her non-pecuniary damages was reduced to $1,000,000; the award of $400,000 to Sophia's parents as a unit was reduced to $100,000; the award of $1,757,667 for Sophia's attendant care was eliminated completely; and the case was remanded to the Trial Court for the recalculation of Sophia's pecuniary loss in accordance with its Opinion.

Petitioners' Motion for Rehearing in the Court of Appeals was overruled on January 27, 1987 [App. 37].

REASONS FOR GRANTING WRIT UNDER QUESTION I

Review Necessary to Insure Proper Implementation of Clearly Erroneous Rule

Federal liability for medical malpractice under the Federal Tort Claims Act (FTCA) 28 USCA § 1346, *et seq.* is an emerging and unsettled area of the law. Hence, the guidance of this Court is necessary to implement and administer the purposes for which the Statute was enacted.

This Court has previously granted certiorari to review the appropriate limitations period for bringing such an action. See *United States v. Kubrick,* 444 U.S. 111, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979), reversing *Kubrick v. United States,* 581 F.2d 1092, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766 (3rd Cir. 1978).

The current standard for review of damages is from this Court's decision in *United States v. United States Gypsum Co.,* 333 U.S. 364 (1948), which, as utilized by the various Circuits, permits a reviewing court to overturn a District Court determination of damages whenever the appellate court is "left with the definite and firm conviction that a mistake has been committed." *Id.* at 395.

The Court of Appeals in the present case impermissibly utilized the "clearly erroneous" standard of review to substitute its judgment for that of the District Court. This alone is sufficient to merit review.

The Court of Appeals' decision in this case is an object lesson in the problems that arise when an appellate court ignores the limited scope of review established by Rule 52(a) of the Federal Rules of Civil Procedure. It "edited" the trial transcript by deleting critical testimony relied on by the Trial Court and by disregarding the Trial Court's credibility findings. *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518, 528 (1985). The Court of Appeals did not consider the findings of fact of the Trial Court, but only recited and relied on selected portions of the evidence in finding clear error.

It is apparent in this case that the Court of Appeals conducted a *de novo* review. Its *pro forma* references to the "clearly erroneous" rule cannot obscure the very different standard of review which it in fact applied.

The implementation of the "clearly erroneous" standard of review by the various Circuits has resulted in widely disparate and irreconcilable results. Guidance from this Court to the lower courts and the bar is especially needed in the instances where damages are reviewed by the various Circuits and increased or lowered.

For example, in the case *sub judice*, the Ninth Circuit imported Washington State standards to determine that a $2,000,000 award for pain, suffering and mental anguish "shocks our sense of sound judgment." *Trevino v. United States, supra* at 1515. Meanwhile, the Tenth Circuit, in *Hoskie v. United States*, 666 F.2d 1353 (10th Cir. 1981) on remarkably similar injuries to a remarkably similar plaintiff, found that $25,000 for pain and suffering was too low. *Id.* at 1356-1359.

Additional evidence of the wide disparity in the treatment of medical malpractice damage awards in the courts below is shown by a comparison of the instant case to *Caron v. United States*, 548 F.2d 366 (1st Cir. 1976). In the instant case the Ninth Circuit wholly eliminated an award for attendant care, holding that it "shocks our sense of sound judgment," 804 F.2d 1512, 1517, even though it recognized in its Opinion that Sophia Trevino was born severely disabled, has permanent brain damage, a form of cerebral palsy that involves all four extremities, a seizure disorder, mental retardation, gross motor skills at the level of a 12 month old child and a prediction that she will attain a fourth-grade level of reading and writing. In *Caron, supra*, at 371, the First Circuit found that the record "speaks out with substantial weight and credibility, fully supporting the findings" that the appellant required attendant care.

A further example of what does or does not shock the sense of sound judgment of a particular appellate court can be seen in *Jastremski v. United States,* 737 F.2d 666 (7th Cir. 1984). In *Jastremski,* a $400,000 award for cerebral palsy induced by negligent delivery at an army hospital was upheld. The Seventh Circuit upheld the award because appellant's "future development is handicapped and he will be unable to engage in activities or occupations requiring good motor function, especially dexterity and fine coordination." *Id.* at 671-673.

In *Korek v. United States,* 734 F.2d 923 (2nd Cir. 1984), the court's conscience was shocked over the award of $30,000 for pain and suffering out of a $101,000 recovery. *Id.* at 929. The court, in finding the award too low for a 54 year old man rendered impotent and incontinent due to negligent urological care at a VA hospital, remanded "for a new trial on the issue of damages generally." *Id* .

In *Griffin v. United States,* 500 F.2d 1059 (3rd Cir. 1974), the court upheld a $1,200,000 pain and suffering award to a woman totally paralyzed by an innoculation who was expected to live an additional 25 years. *Id.* at 1071. That amount was in addition to $559,946.65 awarded the woman for special damages and $300,000 awarded her husband for loss of consortium.

As evident from the above examples in which the Circuits were all reviewing damage awards rendered under the Tort Claims Act, there is a vast and irreconcilable difference in what shocks the conscience of a particular circuit. This is particularly evident when one notes the similarity in injuries and prognosis between the victim in the

instant case and those in *Hoskie, Caron* and *Jastremski.* Over a decade ago, the Third Circuit in *Griffin* upheld a $1,200,000 pain and suffering award for a woman with a 25 year life expectancy. In 1986, in the instant case, the Ninth Circuit halved a $2,000,000 pain and suffering award, despite the victim's 73 year life expectancy [FF 71, App. 15].

There is disparity within the Ninth Circuit in cases arising in different States. In *Siverson v. United States,* 710 F.2d 557 (9th Cir. 1983), an Arizona case, a medical malpractice award of $1,000,000 in non-pecuniary damages for pain and suffering was upheld for a plaintiff who was 62 years old with a life expectancy of 17.2 years. If $1,000,000 is not excessive for 17.2 years of future pain and suffering, how could $2,000,000 for 73 years of future pain and suffering be excessive and shock the court's sense of justice or sound judgment?

Taken as a whole, the widely variant and fluctuating differences in damages either reduced or added to by the various circuits and within the Ninth Circuit speak eloquently of the need for this Court to exercise jurisdiction and provide guidance on the issue of what should or should not shock a court when awarding damages for medical malpractice under the Federal Tort Claims Act.

REASONS FOR GRANTING WRIT AS TO QUESTION II A

Sophia Trevino's Non-Pecuniary Award Of $2,000,000

A further and profound difficulty with the Opinion of the Court of Appeals is that it ignored the clear rule of this Court with respect to findings of injury. From the nature and extent of Sophia Trevino's injuries, it is deemed that the Trial Court drew the necessary inferences in support of its award of $2,000,000 for the mental anguish and pain and suffering including the destruction of her ability to enjoy life. Such inferences in support of the Trial Court's award of $2,000,000 cannot be said to be clearly erroneous. *Triangle Conduit & Cable Co. v. Federal Trade Commission,* 168 F.2d 175, 179 (7th Cir. 1948), *aff'd* 336 U.S. 956, 69 S. Ct. 888, 93 L. Ed. 1110 (1949).

In determining if a non-pecuniary damage award is clearly erroneous the reviewing court looks primarily to the entire evidence in the case and, in seeking to maintain some degree of uniformity in cases involving similar losses, compares the award to other similar cases. *Morrow v. Greyhound Lines, Inc.,* 541 F.2d 713, 720-722 (8th Cir. 1976); *Thompson v. National R.R. Passenger Corp.,* 621 F.2d 814 (6th Cir. 1980), cert. den. 449 U.S. 1035, 101 S. Ct. 611, 66 L. Ed. 2d 497; *Felder v. United States,* 543 F.2d 657, 674 (9th Cir. 1976); *Shaw v. United States,* 741 F.2d 1202 (9th Cir. 1984). The only discussion of the evidence by the Court of Appeals as to Sophia's non-pecuniary award was at p. 1515 of its Opinion [App. 24], where the Court of Appeals referred to a small portion of

the testimony, all of which cut against the trial court's findings. This is not an accepted way to review the entire evidence. *Fowler v. Blue Bell, Inc.*, 737 F.2d 1007, 1013 (11th Cir. 1984). *Anderson v. City of Bessemer City, N.C., supra.*

The Court of Appeals impermissibly substituted its judgment for that of the Trial Court. At page 1515 of its Opinion [App. 24], the Court of Appeals edited the evidence by holding:

> "Nonetheless, an award of $2.0 million is excessive for a child who will be able to attain a fourth grade reading and writing level, who will be able to work during her adult life, and who has been described as 'a delightful little child who obviously expects to be responded to positively by others . . . and who is imaginative in her play."

None of the above quoted evidence recited by the Court of Appeals relates to any findings of fact by the Trial Court as to Sophia Trevino's mental anguish and pain and suffering and the loss and destruction of her ability to enjoy life.

Nowhere does the Court of Appeals take into consideration that Sophia Trevino's mental anguish and pain and suffering includes the loss and destruction of her ability to enjoy life.

The Court of Appeals' reasons are not a valid basis for reducing the award for mental anguish and pain and suffering, including loss and destruction of the ability to enjoy life. The statement by the Court of Appeals that Sophia Trevino will be able to work during her adult life is not supported by any findings of fact in this case. The Court of Appeals did not disturb the monetary award that

compensated Sophia Trevino for a total loss of future earning capacity.

In the instant case the Court of Appeals failed to make a meaningful comparison of Washington cases, mentioning in its Opinion only the *Shaw* case, *supra,* and the case of *Bingaman v. Grays Harbor Community Hospital,* 103 Wash. 2d 831, 699 P.2d 1230 (1985) (en banc).

Scotty Shaw and Sophia Trevino were both 3½ years old at the time of their trials. Both children had permanent severe injuries and brain damage. However, there is a significant difference in the evidence concerning their life expectancies which the Court of Appeals completely ignored. Scotty Shaw's life expectancy was 50 years [Appellee's Brief, Addendum 1]. Sophia Trevino's life expectancy was 73 years [FF 39, 71, App. 9, 15]. The transcript was "edited" by the Court of Appeals to omit this critical evidence of Sophia Trevino's 73 years of life expectancy.

It is clear from the evidence that Sophia Trevino will be suffering mental anguish and pain and suffering, including loss and destruction of her ability to enjoy life, for approximately twenty-three more years than Scotty Shaw. In the *Shaw* case the Court of Appeals determined that $1,000,000 was a proper damage award for a child with a 50 year life expectancy, while in this case the same Court of Appeals held $2,000,000 excessive for a child with a 73 year life expectancy. The so-called comparison between the Scotty Shaw award and the Sophia Trevino award is extremely misleading because the Court of Appeals failed to state in its opinion the vast difference in the life expectancies of the two children.

The same trial judge made the awards to both children. At the time of the *Trevino* Judgment the trial judge was aware of the fact that in the *Shaw* case $1,000,000 had been upheld as a fair and adequate award for a brain damaged child of 3½ years of age with a life expectancy of 50 years.

With evidence in this case before him that Sophia Trevino was a brain damaged child 3½ years of age with a life expectancy of 73 years, it was not clearly erroneous for him to award $2,000,000 to Sophia Trevino. Who can logically be shocked by such an award? Why is it not sound judgment to award a larger sum of money to a child who faces almost a quarter of a century more of mental anguish and pain and suffering, including loss and destruction of the ability to enjoy life, than another child with similar injuries?

The Court of Appeals said in its Opinion on 1515 [App. 24] that "It may be true that medical malpractice awards in Washington have increased much beyond the $1.1 million noted in *Shaw*. Cf. *Bingaman v. Grays Harbor Community Hosp.*" In the *Bingaman* case, the Trial Court's award was $412,000.00 *for thirty-five hours* of pain and suffering to the 26 year old plaintiff before her death. The appellate court upheld that award. Because the plaintiff in *Bingaman* died, she was not awarded anything for loss and destruction of her ability to enjoy life. However, the award to Sophia Trevino includes the loss and destruction of her ability to enjoy life for 73 years. How in the name of justice or sound judgment could $412,000 for *thirty-five hours* of pain and suffering not be excessive and $2,000,000 for 73 years of mental anguish and pain

and suffering, including loss and destruction of the ability to enjoy life be excessive? If the Court of Appeals desired to follow the law and determine whether the award to Sophia Trevino was excessive based upon valid comparisons with other awards in Washington, then the *Bingaman* case, *supra,* would indicate that the award to Sophia Trevino certainly was not excessive.

There are other cases from the State of Washington the Court of Appeals ignored, even though it is proper to consider them. For example, *Thompson v. Community Hospital, King County, Washington,* Cause No. 81-2-16549-4 (1985) cited by Respondent [Appellant's Brief, its Appendix 4a-5a] is a comparable Washington case. In *Thompson v. Community Hospital, supra,* a nine year old child, with comparable injuries to Sophia Trevino's, received a jury award of $4,175,000 and the parents received a jury award of $1,500,000 for their damages. This was in addition to $1,500,000 paid by another defendant shortly before trial [Appellant's Brief, its Appendix 4a-5a]. The child in the case of *Thompson v. Community Hospital, supra,* had a life expectancy of 46 years [Appellant's Brief. its Appendix 12a]. *Again, it is clear* that Sophia Trevino must suffer 27 more years of mental anguish and pain and suffering, including loss and destruction of her ability to enjoy life, than the child in the case of *Thompson v. Community Hospital, supra.*

Finally, it is important to note that the Court of Appeals *failed to consider* the most recent Washington Federal Court case decided by District Judge J. R. Follquist on May 12, 1986. Respondent furnished the Court of Appeals a copy of the case of *Dearing v. United States of America,* in the United States District Court for the East-

ern District of Washington, Cause No. C-82-654-SPM [filed with Court of Appeals by Letter from Respondent under Rule 28(j), *Federal Rules of Appellate Procedure*]. In the *Dearing* case non-pecuniary damages in the amount of $1,250,000.00 were awarded to a 6½ year old plaintiff with comparable injuries to Sophia Trevino. This is a comparable case which demonstrates that the reduction by the Court of Appeals of the non-pecuniary award to Sophia Trevino was improper.

Did the Court of Appeals actually determine the question of whether the award made to the minor plaintiff was excessive based upon a comparison of awards in other cases in Washington? Clearly, the answer is "No." Because of the multitude of errors by the Court of Appeals this Court should exercise its supervisory powers.

REASONS FOR GRANTING WRIT AS TO QUESTION II B

Ruben and Rachel Trevino's Non-Pecuniary Award of $400,000

The Trial Court found that Ruben and Rachael Trevino, parents of Sophia Trevino, have suffered emotional anguish and mental stress as a result of their daughter's condition and that they will continue to suffer such anguish and stress in the future [FF 72, 77, App. 15]. There is evidence to support this award. The Trial Court found that Ruben and Rachael Trevino have suffered damages of $200,000 for loss of love and companionship of their daughter, and $200,000 for injury to, or destruction of, the par-

ent-child relationship including parental grief and mental anguish and suffering [FF 77, App. 15].

The same reasoning, arguments and authorities urged above as to Sophia Trevino's $2,000,000 non-pecuniary award applies to the $400,000 non-pecuniary award to her parents. In the case of *Thompson v. Community Hospital, supra,* the award to the parents was $1,500,000. Even after the settlement of the case of *Thompson v. Community Hospital, supra,* the parents received a present value award of $434,013 [Appellant's Brief, its Appendix 11a]. It is obvious that the Court of Appeals in this case did not consider all the Washington case awards for similar damages because the court completely failed to compare this case with *Thompson.*

REASONS FOR GRANTING WRIT AS TO QUESTION II C

Sophia Trevino's $1,757,667 Award For Future Attendant Care

In addition to the general reasons set out above for granting this writ, the following reasons are applicable to this question.

In determining whether or not a pecuniary damage award is erroneous, the standard of review is a review of the entire evidence. Of necessity, in reviewing awards for pecuniary damages, each case must stand on its own facts.

The Trial Court in finding of fact 65 found that Sophia Trevino will need care and attention by a nurse assistant (attendant care) for 5 hours per day for the rest

of her lifetime, *based on the more credible evidence* [see the Trial Court's preamble to its Conclusions of Law App. 17].

There was a conflict in the testimony as to Sophia Trevino's need for future attendant care. The Trial Court resolved the conflict in favor of Petitioners. "*Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous*" *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S. Ct. 1504. 84 L. Ed. 2d 518, 528 (1985); *United States v. Yellow Cab Co.*, 338 U.S. 338, 342, 70 S. Ct. 177, 94 L. Ed. 150 (1949).

A review of the entire evidence before the Trial Court in this case shows that its resolution of the conflicting evidence in favor of Petitioners is plausible. Where this is the case, the Court of Appeals may not reverse the Trial Court even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). *United States v. Real Estate Boards*, 339 U.S. 485, 495-496, 70 S. Ct. 711, 94 L. Ed. 1007 (1950). In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly keep in mind that their function is not to decide factual issues *de novo*. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969).

Anderson is particularly instructive. In *Anderson* this Honorable Court examined a similar instance and concluded that the Court of Appeals misapprehended and misapplied the clearly erroneous standard. Thus the Court of

Appeals in the present case is at odds with the language in *Anderson*. To misapprehend and misapply the clearly erroneous standard is clear error under the rationale of *Anderson*.

Rule 52(a) demands even greater deference to the Trial Court's findings based on credibility of the witnesses. When the trial judge's findings are based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. *Anderson v. City of Bessemer City, N.C., supra.* In this case, the trial judge elected to credit the testimony of Petitioners' witness, Paula Behrhorst, that Sophia Trevino needed attendant care. Her story is coherent and facially plausible, not contradicted by extrinsic evidence, and not internally inconsistent.

The Court of Appeals eliminated entirely the award for attendant care. That constitutes a holding that Sophia Trevino will need no attendant care for the next 69.5 years of her life.

The Court of Appeals' statement that "the district court's grant of attendant care is wholly unsupported by the record" [App. 27], is contrary to the evidence adduced at the trial. Such statement constituted a substitution by the Court of Appeals of its own judgment for that of the Trial Court, which is in clear contravention of *Anderson*.

For example, the Court of Appeals completely ignored important evidence relating to the need for future attendant care. Susan Cannon, Respondent's expert witness, testified in her deposition as follows:

> "In my second report in 1985, the test results reported that Sophia Trevino's gross motor development is at a 11½ to 12 month level. I feel that those test results are valid. *My opinion is that Sophia Trevino's gross motors will stay at this level the rest of her life*" (Emphasis added) [SRE 29-30].

Does a person who is severely disabled with permanent brain damage and with a permanent 12 month level of gross motor skills need attendant care? Of course she does. The only real question was how much care is needed. The trial court determined this to be 5 hours a day for the rest of her life [FF 65, App. 14]. In addition to the evidence before the Court of Appeals, the trial judge saw and observed Sophia Trevino in person in court [TR II-129] and viewed two video tapes made in Kansas in 1983 and 1985 concerning certain tests administered to her [TR II-198-200, TR IV-41-42].

Marianne Taylor, Respondent's expert witness, testified that:

> "The best situation for her is . . . that when she's 18 or 21 that she would go into a group living situation designed for persons with developmental disabilities. . . . There would be someone . . . to assist her in learning whatever independent living skills she still needed to become as independent as she could be" [TR IV-69-70].

Respondent's counsel, in final argument to the Trial Court acknowledged that Sophia Trevino would live in a group home situation [TR V-101].

Does the foregoing sworn testimony of the Respondent's expert witnesses constitute evidence of no need for attendant care for Sophia Trevino? Certainly not. On such an important question concerning 73 years of

need it is incredible that the Court of Appeals has entirely eliminated the award for attendant care.

Petitioners' expert nursing witness, Paula Behrhorst, was employed as director of the private duty division of Visiting Nurses Association which provide private duty nursing care in the home; she had nursed a patient who had cerebral palsy [TR II-108-109]; she had read both of the independent medical reports from the University of Kansas Medical Center, Children's Rehabilitation Unit, in Kansas City, Kansas [TR II-115]; she had visited in the home of Sophia Trevino on two occasions and personally observed her in December, 1984 [TR II-107], and in March, 1985 [TR II-111-112]. She testified that Sophia Trevino needed a nurse's aide and the reasonable cost of such care in Odessa, Texas was $8.50 per hour [TR II-112]. Paula Behrhorst's testimony, and the other evidence heard by the Trial Court, would have supported an award of $8.50 per hour for the attendant care for five hours per day until Sophia reached 18 years of age and thereafter for 10 hours per day for the rest of her life [TR II-112]. This would amount to $4,831,889 discounted to present value after-tax [TR II-142, SRE 35-36].

The Trial Court awarded $7.00 per hour for five hours per day for the rest of Sophia's life for attendant care, which amounted to $1,757,667 when discounted to present value after-tax. The trial court followed the law in *United States v. Hayashi*, 282 F.2d 599 (9th Cir. 1960), expressed at page 602 of its Opinion:

> "It is the function of the fact finder to evaluate all the evidence produced on the question of damages. On a damage item of this kind the selection of an award

figure lying within the upper and lower reaches of the evidence represents a proper exercise of that function."

The denial of any award whatsoever to Sophia Trevino for attendant care in this case by the Court of Appeals cannot be justified by a correct appraisal of the evidence presented to the trial judge. To hold that a person who is severely disabled with permanent brain damage and with a permanent 12 month level of gross motor skills needs no attendant care is unreasonable and not a true analysis of the expert testimony.

The Opinion of the Court of Appeals clearly shows that it did not review the entire evidence. The portion of the testimony referred to by the lower court on page 1516 of its Opinion [App. 26] concerning Sophia Trevino and the tricycle provides a vivid example of improper editing of the evidence by the Court of Appeals and gives the wrong impression of Paula Behrhorst's testimony and the true facts. Nurse Behrhorst *did not* testify that Sophia could ride a tricycle. Under cross examination by Respondent's attorney, she testified:

"Q. Miss Behrhorst, have you seen Sophia here in the courthouse today?

"A. Yes.

"Q. Did you notice that she has a bandage or a brace on her left foot?

"A. I believe it's a cast. Yes.

"Q. Were you told that she hurt her foot because she fell off the tricycle recently?

"A. I was told that she was on a tricycle and the tricycle was pushed from behind. Not that she fell off.

"Q. And this, in your view, is consistent with a person who is going to need ten hours of nursing care a day for the rest of her life?

"A. The fact that she can ride the bicycle, or tricycle, doesn't have any bearing on whether she can feed herself, and dress herself, and toilet herself." [TR II-114-115].

Rachel Trevino testified as follows about the tricycle incident:

"Q. Now, Mrs. Trevino, there was earlier some testimony and the comment about how your daughter, Sophia, broke her leg. And, I need for you to please explain to the Judge how this broken leg occurred.

"A. Okay. She has a tricycle that one of the therapists recommended she have a tricycle. That we were to put her on skates, and put some skates on the pedals and tie her shoes to the pedals to make her go up and down. And, my husband was pushing her and her foot came off and it got caught, you know, behind the pedals, and the bike kicked over and fell, and she broke her, kind of down there toward her ankle.

"Q. Sophia is not able to ride that tricycle by herself, or pump the tires, is she ma'am?

"A. No, she's not.

"Q. She was being pushed by her father, I take it?

"A. Yes." [TR V-76]

It is difficult to believe that the Court of Appeals could have made such a misstatement of the testimony if it had reviewed the entire evidence including the foregoing.

Considering all the evidence (including the two video tapes viewed only by the Trial Court [TR II-198-200, TR IV-41-42]), Respondent has not established *as a matter of law* that *no* attendant care is needed by Sophia Trevino during the next 69.5 years of her life.

REASONS FOR GRANTING WRIT AS TO QUESTION II D

The —2% Discount Rate After-Tax

In addition to the above reasons for granting the Writ, Petitioner submits the following reasons.

The decision of the Court of Appeals is in conflict with *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 103 S. Ct. 2541, 76 L. Ed. 2d 768 (1983), which it had previously followed in *Shaw v. United States,* 741 F.2d 1202 (9th Cir. 1984).

The holding by the Court of Appeals is in conflict with *Culver v. Slater Boat Co.,* 722 F.2d 114 (5th Cir. 1984), which states at p. 122:

> "In judge-tried cases, a trial court adopting a pre-tax discount rate between one and three percent will not be reversed if it explains the reasons for its choice. This guideline, however, goes only to the reasonableness of the correlation between the pre-tax market rate of interest and the inflation rate. As discussed above, this pre-tax discount rate must then

be adjusted for tax effects. If supported by appropriate expert opinion, the trial judge might make no discount or even adopt a negative rate not to exceed —1.5% *before adjusting for tax effects.*" (emphasis added).

The Court of Appeals used the wrong standard of review in its decision concerning the —2% discount rate. It used the "abuse of discretion" standard [App. 23]. The "abuse of discretion" standard is used to test which of the three permissible methods approved by *Pfeifer* and *Shaw* the Trial Court should adopt in reducing the awards to present value after-tax. It does not apply to the question of what discount rate should be used. The Trial Court's determination of an appropriate discount rate is an evidentiary issue, which is tested by the "clearly erroneous" standard of review. *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622, 626 (9th Cir. 1982). *Chesapeake & Ohio Railway Company v. Kelly*, 241 U.S. 485, 491, 36 S. Ct. 630, 632, 60 L. Ed. 1117 (1916). The Court of Appeals did not fault the method chosen by the trial Court. The Court said ". . . we decline to embrace a negative discount rate *on the basis of this record*" (Emphasis added) [App. 33].

The Court of Appeals rejected a negative discount rate by holding as a matter of law that 1974-1982 were unrepresentative and aberrational years and could not be used in arriving at a discount rate. The question of the discount rate is an ultimate fact issue. The Court of Appeals cannot avoid adhering to the "clearly erroneous" standard of review as to such ultimate fact issue by erroneously holding that subsidiary factual findings are questions of law. *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982).

Both the economic expert, Dr. Bassett, and the trial court adhered to the guidelines promulgated in *Pfeifer, supra*. The Court of Appeals erroneously held that they did not.

By its Opinion and remand to recalculate Sophia's pecuniary loss, the Court of Appeals converted this case into a graduate seminar on economics forecasting (contrary to *Pfeifer*), requiring another unnecessary costly trial.

The Court of Appeals erred in its disapproval of historical inflation. The Trial Court used the historical increase in wages as a measure of historical inflation and as a basis for the prediction of future inflation. The Court of Appeals held that the Trial Court could not use such measure because it included wage increases due to promotion as well as to inflation. The Court of Appeals is in error because the trial court did not include increases due to promotion. The Trial Court included raises due to general productivity. *Pfeifer, supra*, states that an economist in his predictions should take into account and consider productivity change in two respects: (1) general productivity and (2) specific productivity.

The Court of Appeals erred in its interpretation of the significance of tax-free securities. This is another example of the Court of Appeals editing the evidence and disregarding the findings of fact. Both economic experts who testified at the trial, for the sole purpose of a simple method of calculating the income tax on the interest earned on the lump sum award, assumed an investment in tax-free securities [TR II-151-152, RE 75, 76, SRE 77-78]. The

experts' choice is preferred and logically wise. The trial court rejected the complex and uncertain method, which requires predicting income tax rates 70 years into the future.

This Honorable Court has addressed in detail the use of discount rates in determining present value in *Jones & Laughlin Steel Corp. v. Pfeifer, supra.* This Honorable Court in *Pfeifer* stated:

> "We do not suggest that the trial Judge should embark on a search for 'delusive exactness.' It is perfectly obvious that the most detailed inquiry can at best produce an approximate result. . . . But we are satisfied that whatever rate the District Court may choose to discount the estimated stream of future earnings, it must make a deliberate choice, rather than assuming that it is bound by a rule of state law."
>
> "Even in an inflation-free economy—that is to say one in which the prices of consumer goods remain stable—a worker's wages tend to inflate. . . . The Discount rate should be based on the rate of interest that would be earned on 'the best and safest investments.' . . . The Discount rate should not reflect the market's premium for investors who are willing to accept some risk of default . . . The discount rate should also represent the after-tax rate of return to the injured worker. . . . Unfortunately for triers of facts, ours is not an inflation-free economy. Inflation has been a permanent fixture in our economy for many decades . . . The average accident trial should not be converted into a graduate seminar on economic forecasting."

This Honorable Court in *Pfeifer, supra,* stated: "There may be a sound economic argument for even further set-offs" and approved three methods as acceptable for a trier of fact to determine present value of a damage award. The Honorable Court concluded:

> "First, by its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a 'rough and ready' effort to put the plaintiff in the position he would have been had he not been injured. Second, sustained price inflation can make the award substantially less precise. Inflation's current magnitude and unpredictability create a substantial risk that the damage award will prove to have little relation to the lost wages it purports to replace. Third, the question of lost earnings can arise in many different contexts. In some sectors of the economy, it is far easier to assemble evidence of an individual's most likely career path than in others."

The Court of Appeals in *Shaw*, acknowledged three acceptable methods for determining the appropriate discount rate, one of which involves the application of a set formula which assumes a constant relationship between the two rates (inflation and interest); independent and adequate proof of each factor is required; the choice among the methods is left to the trial judge, who must explain the approach he adopted. Once the trial judge chooses a rate he should apply it to each of the estimated annual installments, and then add the discounted installments to compute the award.

The Trial Court in this case complied with *Shaw, supra.* The Trial Court chose one of the approved methods which involves the application of a set formula which assumes a constant relationship between inflation and interest—in this case tax free interest [FF 81, App. 16-17]. Independent and adequate proof of each factor was presented to the Court by Dr. Lowell Bassett [TR IV-134-198, RE 58-63, SRE 34-99].

REASONS FOR GRANTING WRIT AS TO QUESTION III

The "Aberrational Years" Doctrine

The Court of Appeals erred in its characterization of the time span of 1974-1982 as "unrepresentative" and "aberrational." The Court of Appeals' novel holding that an expert economist and the Trial Court, as a matter of law, cannot consider the years 1974-1982, denies the effects of inflation, contrary to *Pfeifer, supra,* and *United States v. English,* 521 F.2d 63, 75 (9th Cir. 1975). Historical inflation is a question of fact, not of law. *Alma v. Manufacturers Hanover Trust Co.,* 684 F.2d 622, 626 (9th Cir. 1982). It is apparent that the Court of Appeals has ignored its prior holding in *Alma, supra,* wherein it held:

> "Finally, where competent evidence of each factor is presented, the finder of fact must consider both the discount and the inflation rate in computing the award. The cases and authorities suggest several approaches in this mathematical calculation. The choice of such methods is best left to the district judge, who can determine how best to compute a fair and reasonable award on the basis of the evidence before the court."

There is no fact finding by the Trial Court, nor is there any evidence in the record that the years 1974-1982 are unrepresentative or aberrational years. In holding that such years are unrepresentative and aberrational, the Court of Appeals has created new law contrary to *Pfeifer, Shaw*

and *Alma, supra,* and has departed from sound reasoning and jurisprudence.[1]

CONCLUSION

The point of this analysis is to demonstrate the wisdom of this Honorable Court's insistence that appellate courts do not disturb damage awards unless the trial court's findings are clearly erroneous. Appellate courts are ill equipped to consider the issues *de novo.* This is exactly what occurred in the present case. Therefore, it is time for this Court to articulate principles that will permit better utilization of the clearly erroneous standard and thus avoid substituted findings such as occurred in the present case.

---

[1]One of the most distressing aspects of the Court of Appeals' rejection of the thirty-year time span used by Dr. Bassett is that no guidance is given as to what an acceptable time span should be. If the eight years between 1974 and 1982 are characterized as aberrational, would it be appropriate to include the latter 1960's because of the Vietnam War and its guns and butter economy? Would it be appropriate to include the immediate post-World War II period which was characterized by a rapidly growing economy and interest rates held artificially low by governmental regulation? If the "aberrational years 1974-82" should be excluded, should not the last three years also be excluded since inflationary rates are actually artificially low because of the dramatic reduction in the same oil prices which caused inflation from 1974 to 1979? The Court of Appeals has given neither the Trial Court nor the lawyers trying these cases any guidance as to what would be an appropriate time span to rely upon. The failure of the Court of Appeals to establish a standard provides further support to the argument that this is an issue best left to the economists who study the trends in interest rates and inflation and are best able to ascertain what period of time should be used for an historical analysis.

PRAYER FOR RELIEF

For the foregoing reasons, Petitioners respectfully request that this Honorable Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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JUDGMENT IN A CIVIL CASE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
At Tacoma

CASE TITLE	DOCKET NUMBER
RUBEN TREVINO, et al	C84-179T
v.	NAME OF JUDGE
UNITED STATES	OR MAGISTRATE
OF AMERICA	JACK E. TANNER,
	U. S. District Judge

[ ] *Jury Verdict.* This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] *Decision by Court.* This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The defendant failed to provide the accepted standard of care to plaintiff Sophia Trevino. That failure and breach of care was the proximate cause of the injuries sustained by the minor Plaintiff.

Plaintiff's parents, Ruben and Rachael Trevino are entitled to damages as a marital community in the amount of $400,000.00.

The minor plaintiff is awarded pecuniary damages from the defendant in the amount of $3,932,504.00.

The minor plaintiff shall recover past and future general damages from the defendant in the sum of $2,000,000.00.

ENTERED ON DOCKET JUN 7 - 1985

By Deputy /s/ (Illegible)

FILED JUN 7 1985
Clerk U.S. District Court
Western District of Washington At Tacoma

By /s/ (Illegible) Deputy
CLERK BRUCE RIFKIN DATE
(BY) DEPUTY CLERK /s/ (Illegible) June 7, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NO. C84-179T

RUBEN TREVINO and RACHEL TREVINO,
husband and wife, individually and
as Guardians Ad Litem of
SOPHIA TREVINO, a Minor,

Plaintiff,

-vs-

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(filed Jun 7, 1985)

THIS MATTER came on regularly for trial before the above-entitled Court, the Honorable Jack E. Tanner sitting without a jury. Plaintiffs being represented by their counsel, Robert I. Deutscher, Phillip Godwin and James Cunningham, Defendant being represented by their counsel Christopher L. Pickrell, Assistant United States Attorney, the Court having heard the testimony of the parties and their witnesses, and having reviewed all of the evidence and briefs of the parties and closing argument, and the Court being fully advised in the premises does hereby make the following:

FINDINGS OF FACT

1. This Court has jurisdiction pursuant to Title 28 U.S.C., § 1346(b) and § 2671, *et seq.*

2. Madigan Army Medical Center (hereinafter referred to as MAMC) is a medical treatment center operated by the United States of America. It is classified as a tertiary referral center.

3. Ruben Trevino and Rachel Trevino are husband and wife. They are residents of Odessa, Ector County, Texas. They are the duly appointed Guardians Ad Litem for their minor daughter, Sophia Trevino.

4. This cause of action arises from treatment, provided at MAMC to Rachael Trevino and her child, Sophia Trevino, prior to, and at the time of, the birth of Sophia Trevino on November 3, 1981.

5. The Trevinos had access to MAMC at the time of Sophia Trevino's birth because Ruben Trevino was in the United States Army.

6. Rachael Trevino's prenatal care was furnished by MAMC.

7. On October 28, 1981, at MAMC Prenatal Clinic, Rachael Trevino's blood pressure was determined to be 128/100, which was abnormal, and she had a 52 pound weight gain during her pregnancy.

8. Rachel Trevino was seen at or about 11:30 a.m. on November 3, 1981, at MAMC, at which time she had third trimester vaginal bleeding.

9. At or about 12:30 p.m., Rachel Trevino was noted to be passing blood clots from the vagina in association with lower uterine contractions that were irregular in nature.

10. During the critical labor time involved, Dr. Frederick E. Harlass, Dr. Stephen Spaulding, and Dr. Stephen R. Jones, all first year residents, were on duty at MAMC.

11. The senior obstetric resident physician who was on duty at MAMC on November 3, 1981, at 3:00 p.m. was Captain Dale A. Sundwall.

12. Rachael Trevino was seen by physicians Frederick E. Harlass, Dale Sundwall, and Ed Biggerstaff, the staff physician on duty, prior to 3:15 p.m. on November 3, 1981.

13. The term "third trimester bleeding" means copious bleeding from the vagina. The word "copious" means a large amount. Third trimester bleeding is one of the signs of the possible presence of abruptio placentae. Third trimester bleeding is one of the things that can cause fetal hypoxia.

14. Prior to 3:15 p.m. on November 3, 1981, Dr. Frederick Harlass reported to the senior resident obstetric physician on duty, Dr. Dale Sundwall, that Rachael Trevino had third trimester bleeding.

15. Prior to 3:15 p.m. Dr. Sundwall and Dr. Biggerstaff attempted to do a sonogram on Rachael Trevino but the results were not adequate due to inadequate equipment.

16. The MAMC form requesting the sonogram test stated that Mrs. Trevino had vaginal bleeding.

17. Dr. Dale Sundwall telephoned the radiology department and stated that the request for the sonogram was urgent.

18. Rachael Trevino was sent to MAMC Radiology Department to have a sonogram performed. The sonogram test was performed between 3:15 p.m. and 3:35 p.m. The Results of the sonogram ruled out the presence of a placenta previa.

19. Rachael Trevino returned to the labor and delivery ward at 4:00 p.m. and was examined by Dr. Harlass, at which time she had third trimester bleeding. She was dilated 3 cm with a station of -1 with her bag of waters intact. Her blood pressure was 142/90 and there was a fetal heart rate of 152 beats per minute. Dr. Harlass asked her to ambulate for an hour.

20. The MAMC obstetric guidelines for responsibility and consultation in effect on November 3, 1981, state that the senior resident is to be notified of all third trimester bleeders. The same guidelines provide that the staff physician is to be notified about any third trimester patient with significant bleeding.

21. At 4:00 p.m. Dr. Harlass made a diagnosis that Rachael Trevino had a marginal separation of the placenta. He did not record this diagnosis in the hospital record of Rachael Trevino. He did not report the diagnosis of marginal separation of the placenta of Rachael Trevino to Dr. Dale Sundwall.

22. Dr. Dale Sundwall, the senior resident physician, did not record any diagnosis concerning Rachael Trevino in her hospital record.

23. Rachael Trevino returned from ambulation to the labor room at 5:25 p.m. and was seen by Dr. Stephen Spaulding. He examined her and she was dilated to 4 cm with a station of -1 and her bag of waters was still intact; the fetal heart rate was 140. Dr. Spaulding asked Rachael Trevino to walk some more.

24. Rachael Trevino returned from walking at 6:25 p.m. and was seen and examined by Dr. Stephen Jones, a first year resident in obstetrics. At this time she was di-

lated 4 cm with a 0 to -1 station and had her bag of waters still intact. The fetal heart rate was 146. Her blood pressure was 142/90, which was abnormal. She was admitted to the hospital labor room as a patient at 6:30 p.m.

25. At the time Rachael Trevino was admitted to the labor room at 6:30 p.m. she was having significant third trimester vaginal bleeding and was given an enema.

26. The enema given to Rachael Trevino was contraindicated because of such bleeding.

27. No bedrest was ordered for Rachael Trevino until 7:40 p.m. on November 3, 1981.

28. No fetal heart rate recording and monitoring of Sophia Trevino was performed by anyone employed by the Defendant for 70 minutes between 6:30 p.m. and 7:40 p.m. on November 3, 1981.

29. During the first stage of labor the fetal heart rate should be recorded each hour and checked at least every 15 minutes.

30. The failure to record and monitor the fetal heart rate of Sophia Trevino for 70 minutes between 6:30 p.m. and 7:40 p.m. on November 3, 1981, was a deviation from the reasonably prudent existing obstetric standard of care in the State of Washington.

31. On November 3, 1981 an external fetal heart rate monitor was ordered for Rachael Trevino at 7:30 p.m. and was placed on her at 7:40 p.m.

32. A fetal scalp monitor was placed at 7:42 p.m., which showed a sustained fetal bradycardia of approximately 80 which was dangerously low and which did not recover after contractions. Rachael Trevino was given

oxygen and placed on her left side with no recovery of the heart rate, she was shifted to her right side and finally to a knee-chest position. There was no recovery from the bradycardia. In the delivery room the fetal heart rate had severely declined to the rate of 40.

33. Rachael Trevino was taken to the delivery room at 7:45 p.m., at that time she was not completely dilated. She was again placed on her left side on the delivery table and was given oxygen without any significant change in fetal heart rate. A vacuum extraction delivery was attempted. The suction cup of the vacuum extractor was inserted and the baby was guided down the birth canal to a +2 station when suction was lost. A large amount of blood was lost through the-vagina.

34. When the attempted vacuum extraction was begun in the delivery room the baby's head was at the midstation.

35. When the attempted vacuum extraction of the baby was begun in the delivery room, Rachael Trevino was not fully dilated to 10 cm.

36. The vaginal forceps delivery of Sophia Trevino was performed from the midstation.

37. Sophia Trevino had fetal distress from 7:40 p.m. until 8:07 p.m. on November 3, 1981, a period of 27 minutes.

38. The fetal distress suffered by Sophia Trevino was a proximate cause of the brain damage and all other injuries suffered by her.

39. The baby was delivered at 8:07 p.m. At the time of delivery Sophia Trevino was cyanotic, apneic, extremely limp, severly [sic] depressed by asphyxia, with hypovolemia and severe anoxic encephalopathy. The APGAR score

of Sophia Trevino was 0 at 1 minute and 0 at 5 minutes. Sophia Trevino was born with severe acidosis and was barely alive at birth. Sophia Trevino has permanent brain damage, impairment of motor development and abilities, impairment of speech, impairment of ability to express herself. She has a mixed type of cerebral palsy involving impairment of all four extremeties known as atonic quadriparesis. Her EEG test results are abnormal and based upon reasonable medical probability will remain abnormal throughout her lifetime. She suffers from convulsive seizures and is mentally retarded. In all reasonable medical probability, Sophia Trevino will have a normal life expectancy.

40. Later, on the night that Sophia Trevino was born, she had a left cephalohematoma present.

41. Sophia Trevino's initial arterial blood gas test at MAMC resulted in a ph of 6.741.

42. After Sophia Trevino was born it took about ten (10) minutes of resuscitation before a sustained heart rate was established.

43. Sophia Trevino has structural damage to her brain, damage to her cerebellum, damage to her pyramidal tract and temporal lobe.

44. No diagnosis of abruptio placentae was ever recorded or reported concerning Rachael Trevino on November 3, 1981.

45. No treatment was ever ordered for any abruptio placentae condition of Rachael Trevino on November 3, 1981.

46. No blood transfusions were ever ordered to be given to Rachael Trevino on November 3, 1981.

47. The oxygen supply to the fetus is reduced when there is a separation of the placenta from the uterine wall.

48. The MAMC in-patient hospital record of Rachael Trevino on the tissue examination sheet signed by Maj. Richard C. Keniston, M.D., stated that there was clinical silent abruption.

49. The MAMC in-patient hospital record of Rachael Trevino on the tissue examination sheet signed by Maj. Richard C. Keniston, M.D., states "A recent abruption cannot be ruled out."

50. The MAMC in-patient hospital record of Sophia Trevino at page 118, under the column titled "Complications of labor" has a circle indicating abruptio placenta as one of the complications.

51. The MAMC in-patient hospital record of Sophia Trevino at page 116, Certificate of Live Birth of Sophia Trevino, under the column titled "Complications of Labor" has an "X" indicating abruptio placenta as one of the complications.

52. The MAMC out-patient hospital record of Sophia Trevino at page 46, contains an entry dated November 25, 1981 signed by Gregory Cain, M.D., which states: "History of present illness: 3 w/o female infant status post anoxic encephalopathy secondary to placentae abruptio." The attending obstetricians told Dr. Cain that Rachael Trevino had an abruptio placentae.

53. The MAMC out-patient hospital record of Sophia Trevino at page 41, contains an entry dated December 8, 1981, signed by Dr. Robert Skarin, which states: "Subjective: Follow-up at one month of term infant after asphyxia.

Hypoxic ischemic encephalopathy, seizures, hypovolemic shock after blood loss from abruptio."

54. The MAMC out-patient hospital record of Sophia Trevino at page 24 and 25, contains an entry dated January 19, 1982, signed by Dr. Gregory Cain on page 25. The entry on these pages states: "Subjective: Two and a half month old hispanic female status post neonatal asphyxia secondary to placentae abruptio."

55. The MAMC Pediatric Clinic out-patient record of Sophia Trevino contains an entry dated June 4, 1982, signed by Gregory Cain, M.D., which states: "Sophia Trevino is a seven month old female infant, status post asphyxia neonatorum at birth due to placentae abruptio."

56. The midstation vaginal delivery of Sophia Trevino should not have been attempted when she was severely asphyxiated.

57. Sophia Trevino was cared for in the intensive care nursery at MAMC until her discharge at approximately 2 weeks of age. Her neonatal course was complicated by respiratory insufficiency requiring mechanical ventilation at two different intervals; possible sepsis; hypovolemic anemia requiring two transfusions; hypocalcemia; neonatal seizures; and prerenal oliguria.

58. Sophia Trevino was followed medically and developmentally in the neonatal follow-up clinic of MAMC until July, 1982, at which time the Trevino family moved to Odessa, Texas.

59. Sophia Trevino received neuro-developmental therapy at the Children's Therapy Unit of Good Samaritan Hospital in Puyallup, Washington, prior to the Trevino family moving to Odessa, Texas, in July, 1982.

60. Since July 1982, the Trevino family has resided in Odessa, Texas, and Sophia Trevino has been receiving physical therapy services four days a week. Additionally, Sophia Trevino has been receiving a home visitor two days a week for therapy. All of the services being rendered to Sophia Trevino have been ongoing since July 1982, and are presently being rendered.

61. In December 1983, an Independent Medical Examination was conducted at the request of the Defendant at the University of Kansas Medical Center in Kansas City, Kansas. The purpose of the I.M.E. was to establish Sophia Trevino's present health, and what her health, psychological, social, physiological, functional, educational and economic problems might be in the future.

62. In February 1985, at the request of the Defendant, an updated Independent Medical Examination was performed at the University of Kansas Medical Center in Kansas City, Kansas. According to the updated I.M.E., when Sophia Trevino was 39 months old she was diagnosed as having:

(A) mixed type of crebral [sic] palsy involving all four extremeties with atonic quadriparesis;

(B) Microcephaly secondary to static postanoxic encephalopathy;

(C) Developmental delay;

(D) Motor, speech and language delay;

(E) Convulsive disorder, mixed type, focal and generalized seizure;

(F) A requirement that she will need anti-convulsant therapy;

(G) An E.E.G. showing "Moderately abnormal waking and sleep;"

(H) A spasticity or increased tone noticeably on the right side of her body;

(I) Abnormal E.E.G. test results which will remain so for all of her life;

(J) Feeding skills age equivalent score of approximately 19-½ months;

(K) Dressing and hygiene skills at approximately 20 months;

(L) A need throughout her lifetime for some type of assistive device for community ambulation;

(M) A right spastic hemiparesis, a difficulty in voluntary motor movement;

(N) Mental retardation;

(O) Gross motor skills of 11-½ to 12 months;

(P) A need for speech therapy three to four times weekly through high school, at which time her speech skills will plateau;

(Q) Speech in one word utterances;

(R) Abnormal language and speech skills;

(S) An adaptive behavior that is not as good as a 2-year old;

(T) An inability to compete with normal children academically;

(U) A need for occupational therapy three times weekly through age 21;

(V) A need for physical therapy three times weekly through age 21;

(W) A need for vocational rehabilitation once a week from age 14 through age 30;

(X) A need for advocate services once a month throughout her lifetime;

(Y) A need for special equipment and dentistry care.

63. Sophia Trevino suffered hypoxia during labor and delivery. Her brain was damaged during labor and delivery.

64. The minor Plaintiff is capable of feeling pain and she can perceive her environment.

65. The minor Plaintiff needs care and attention by a nurse assistant (attendant care) for five (5) hours per day for the balance of her life, at $7.00 per hour current cost.

66. The minor Plaintiff will need advocate care from age 18 for the balance of here [sic] life at $200.00 per month current cost.

67. The minor Plaintiff will require special equipment, medication, medical therapy and training for her seizure disorder.

68. The minor Plaintiff has and will continue to experience mental anguish and pain and suffering, including loss and destruction of the ability to enjoy life.

69. The minor Plaintiff has suffered a loss of future earning capacity.

70. The Plaintiff, Sophia Trevino, will suffer damages for future expenses for nursing services, hospital and med-

ical services, including rehabilitation, behavioral counseling, and advocate services.

71. The minor Plaintiff's present life expectancy is 73 years. She is not presently subjected to any life threatening condition.

72. Ruben and Rachael Trevino have suffered emotional anguish and mental stress as a result of their daughter's condition and they will continue to suffer such anguish and stress in the future.

73. Sophia Trevino would have graduated from high school had she been born normal and healthy.

74. A normal, healthy female with a high school education could expect a work life expectancy of 43.2 years at age 18.

75. MAMC was required to provide Rachael Trevino with adequate medical staffing, care and treatment during her labor and delivery.

76. The standard of care in Washington owed to Sophia Trevino was to facilitate her delivery in a prompt, expeditious and reasonably prudent manner.

77. As a proximate cause of Defendant's negligent acts and omissions Ruben and Rachael Trevino have suffered damages of $200,000.00 for the loss of love and companionship of Sophia Trevino, and have suffered additional damages of $200,000.00 for injury to, or destruction of, the parent-child relationship, which includes parental grief and mental anguish and suffering.

78. As a proximate cause of Defendant's negligent acts and omissions Sophia Trevino has suffered damages for total future economic losses (pecuniary damages) con-

sisting of after tax earnings, fringe benefits, attendant care, medical expenses and non-recurring items in the following amounts:

As a High School Graduate:

After-Tax Earnings	$ 1,228,920.00
Fringe Benefits	182,972.00
Attendant Care	1,757,667.00
Advocate Care	56,245.00
Medical Expenses	696,700.00
Non-Recurring Items	10,000.00
Total Economic Loss	3,932,504.00

79. The special damages awarded to Plaintiff, Sophia Trevino, does reflect the impact of Federal Income Taxes as to loss of future earnings over her life expectancy calculated at the annual rate of 12.69% as required. *DeLucca v. U.S.*, 670 F.2d 843 (1982); *Shaw v. United States*, 741 F.2d 1202 (1984).

80. All of the monetary awards to Sophia Trevino have been discounted to present value.

81. The -2% discount rate was determined by the application of a set formula which assumes as constant relationship between inflation and discount rates. The differential between the growth rates and the tax-free rate of return has been stable and has averaged more than two percentage points during the 30-year period 1954-1984. To obtain the present value of economic loss using tax-free short-term interest as the appropriate discount rate, a net discount rate of -2% was applied (wage and cost increases exceed tax-free interest rates by 2%) and calculated the amounts testified to by the economic expert, Dr. Lowell Bassett. A detailed computer analysis was submitted in

evidence to the Court by Dr. Lowell Bassett. (Plaintiff's Exhibit No. 67A). *Shaw v. United States,* supra.

82. The present cash value of the prospective net accumulations and/or net economic loss for the estate of Sophia Trevino is subject to reduction, if any, by the consideration of the impact of federal income tax upon such award. *Shaw v. United States,* supra.

83. As a proximate cause of Defendant's negligent acts and omissions Sophia Trevino has suffered past and future general damages (non-pecuniary) for mental anguish and pain and suffering, which includes the destruction of her ability to enjoy life; in the amount of $2,000,000.00.

From the foregoing Findings of Fact, based upon the more credible evidence, the Court now makes the following:

CONCLUSIONS OF LAW

Any Findings of Fact more appropriately deemed Conclusions of Law are hereby incorporated as such.

1. The Court has jurisdiction over this case pursuant to Title 28 U.S.C. § 1346(b) and § 2671.

2. The physicians and nurses at MAMC were the agents of the Defendant, United States of America, and said Defendant is responsible for the negligent acts and omissions of the MAMC physicians and nurses.

3. The standard of care in the State of Washington as to hospitals, doctors, nurses and other health care providers on November 3, 1981, is set forth in Wash.Rev. Code 7.70.040 as follows:

> The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the State of Washington, acting in the same or similar circumstances;

(2) Such failure was a proximate cause of the injury complained of.

4. Defendant failed to provide the accepted standard of care to Plaintiff, Sophia Trevino. That failure and breach of care was the proximate cause of the injuries sustained by minor Plaintiff.

5. Ruben Trevino and Rachael Trevino are the duly appointed Guardians Ad Litem for their daughter, Sophia Trevino, the minor Plaintiff herein.

6. Plaintiff's parents, Ruben and Rachael Trevino, are entitled to damages, as a marital community, which they have experienced as a direct and proximate cause of Defendant's negligent acts and omissions. Wash.Rev. Code 4.24.010.

7. Through her Guardians, the minor Plaintiff shall recover pecuniary damages from Defendant in the sum of $3,932,504.00.

8. Through her Guardian, the minor Plaintiff shall recover past and future general damages (non-pecuniary) of Defendant in the sum of $2,000,000.00.

9. Ruben and Rachael Trevino, as a marital community, shall recover general damages of Defendant as follows:

(A) $200,000.00 for the loss of love and companionship of their child.

(B) $200,000.00 for the injury to, or destruction of, the parent-child relationship, which includes parental grief and mental anguish and suffering.

(C) Total recovery for the marital community shall be $400,000.00.

DATED at Tacoma, Washington this 7th day of JUNE, 1985.

/s/ Jack E. Tanner
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUBEN TREVINO, et al.,	)	
	)	
Plaintiffs-Appellees,	)	No. 85-4136
	)	
v.	)	DC#
	)	
UNITED STATES OF AMERICA,	)	CV-84-179-JET
	)	
	)	OPINION
Defendant-Appellant.	)	
	)	

(Filed Nov. 28, 1986)

Appeal from the United States District Court
for the Western District of Washington
Jack Tanner, District Judge, Presiding

Argued and Submitted June 4, 1986—
Seattle, Washington

Before: WRIGHT, SNEED, and SCHROEDER, Circuit Judges.

SNEED, Circuit Judge:

Sophia Trevino and her parents sued the United States for medical malpractice, pursuant to the Federal Torts Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2674, arising from the neglient treatment given to Sophia's mother during Sophia's birth. The government concedes liability but appeals the award of over $6.3 million in damages. We modify in part, reverse in part, and remand.

I.

FACTS AND PROCEEDINGS BELOW

On November 3, 1981, Rachael Trevino gave birth to Sophia at Madigan Army Medical Center in Tacoma, Washington (Madigan). During labor, Rachael suffered from a condition known as abruptio placentae, meaning that her placenta was partially detached from the uterine wall. The medical care that she received during labor did not take this condition into account. As a result, Sophia was born severely disabled. She has permanent brain damage, a form of cerebral palsy that involves all four extremities, and a seizure disorder. Evaluations by the University of Kansas Children's Rehabilitation Unit (the Kansas team) and by the government's expert witnesses suggest that Sophia will be mildly mentally retarded, but that she will be able to attend school and attain a fourth-grade level of reading and writing. Her emotional development should be normal. It is her set of physical disabilities, rather than her mental or emotional disabilities, that affect her the most. Experts assessed her gross motor skills as being at the level of a twelve-month-old child and her fine motor skills as being at the level of a twenty-four-month-old child. Although she probably will be able to walk unassisted at home, she will need crutches or a wheelchair outside the home. The Kansas team predicted that, with proper training and encouragement, Sophia will be able to function in a fairly independent manner. They contend that she probably will be able to work in a sheltered workshop setting and that she might even be able to work in the competitive market. The Trevinos contend

that she will never be able to work in the competitive market. Her life expectancy is normal.

Sophia and her parents filed a FTCA action against the United States, alleging that Sophia's injuries had been caused by the negligent treatment provided by Madigan. After a five-day bench trial, the district court entered a judgment for the plaintiffs. It awarded Sophia $2,000,000 in nonpecuniary damages and $3,932,504 in pecuniary damages, and it awarded her parents as a unit $200,000 for loss of love and companionship and $200,000 for injury to the parent-child relationship. The United States moved for a new trial or, in the alternative, for an amended judgment. The court denied the motion, and the United States appeals.

II.

DISCUSSION

A. *Standard of Review*

We review damage awards in FTCA cases for clear error. *Shaw v. United States,* 741 F.2d 1202, 1205 (9th Cir. 1984). The award is clearly erroneous if, after a review of the record, we are " 'left with the definite and firm conviction that a mistake has been committed.' " *Id.* (citing *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948)). To determine whether a given award is excessive, we look to the relevant state's case law on excessive awards. *Id.* The state of Washington considers awards excessive "only if the amount shocks the court's sense of justice or sound judgment" and if it "appears that the trial judge was swayed by passion or prejudice." *Id.* at 1209. To make that determination, we compare the chal-

lenged award to awards in similar cases in the same jurisdiction. *Id.* The choice of a discount rate, used to adjust to present value an award based on an income stream spread over time and, at the same time, to adjust for the effects of inflation, should be reviewed for an abuse of discretion. *Cf. Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 546-47 (1983) (suggesting caution be used in determining a discount rate, given the uncertainties of future economic events).

B. *The Nonpecuniary Award to Sophia*

The district court awarded Sophia $2.0 million for her pain and suffering and her mental anguish. *See* Record Excerpt (R.E.) at 14. The government contends that this award is excessive in light of *Shaw v. United States,* 741 F.2d 1202 (9th Cir. 1984), and comparable Washington cases.

Washington law permits damages for mental anguish and for pain and suffering. *See Shaw,* 741 F.2d at 1208 (citing *Parris v. Johnson,* 3 Wash. App. 853, 860 n.2 (1970)). Our review of an award for nonpecuniary injuries is a "delicate and difficult" process, *see Felder v. United States,* 543 F.2d 657, 674 (9th Cir. 1976), precisely because we must review an award that compensates for damage to intangibles. Since we cannot examine this type of award with any type of mathematical precision, we compare awards in similar cases in order "to maintain some degree of uniformity." *Shaw,* 741 F.2d at 1209.

In *Shaw, Scotty Shaw* was injured by the negligent obstetrical care that his mother received. His injuries included "spastic quadraparesis, blindness, a seizure dis-

order, and profound mental and physical retardation." *Id.* at 1204. The district court awarded $5.0 million in nonpecuniary damages. We reduced the award to $1.0 million after noting, first, that the highest reported verdict for medical malpractice at that time was $1.1 million, *id.* at 1209, and second, that Scotty had not been left wholly incapable of feeling and perceiving life, *see id.*

It may be true that medical malpractice awards in Washington have increased much beyond the $1.1 million noted in *Shaw*. *Cf. Bingaman v. Grays Harbor Community Hosp.*, 103 Wash. 2d 831, 699 P.2d 1230 (1985) (en banc) reinstating the district court's award of $412,000 for the plaintiff's pain and suffering during the thirty-five hours preceding her death). Nonetheless, an award of $2.0 million is excessive for a child who will be able to attain a fourth-grade reading and writing level, who will be able to work during her adult life, and who has been described as "a delightful little child who obviously expects to be responded to positively by others," R.E. at 46 (evaluation by the Kansas team), and who is "imaginative in her play," *id.*, at 40. Such an award indicates a mistake has been made and it shocks our sense of sound judgment. Accordingly, we reduce the nonpecuniary award to Sophia to $1.0 million.

C. *The Nonpecuniary Award to Sophia's Parents*

As already pointed out, the district court awarded Sophia's parents as a unit $200,000 for the loss of her love and companionship and $200,000 for the injury to the parent-child relationship, a total amount of $400,000. *See* R.E. at 13. The government argues that this award, too,

is excessive. We agree. The award shocks our sense of sound judgment also.

An award for loss of love and companionship is analyzed separately from an award for injury to the parent-child relationship. Under Washington law,

> [r]ecovery for loss of companionship compensates the parents for the value of the child's mutual society and protection. Damages for destruction of the parent-child relationship are intended to alleviate parental grief, mental anguish, and suffering.

Shaw, 741 F.2d at 1209 (citations omitted). In *Shaw,* the district court awarded $1.0 million on each of these two grounds to the parents, and we reduced the award to a total of $50,000. *See id.* at 1209-10. Once more we acknowledge that damage awards may have risen dramatically in the last few years. Nonetheless, Sophia's parents will be able to enjoy her company to a far greater degree than would Scotty Shaw's parents. *Cf. id.* at 1210 (recognizing that raising a severely handicapped child would be difficult but would not constitute a total loss of the child's company). We reduce the nonpecuniary damages awarded to Sophia's parents as a unit to $50,000 on each of the two theories of damages, a total of $100,000.

D. *Attendant Care for Sophia*

The district court awarded $1,757,667 in lifetime attendant care for Sophia. *See R.E.* at 13. The government contends that this award is clearly erroneous on two grounds: first, because the court improperly permitted an unqualified witness to testify as an expert, and second, because the award itself was clearly erroneous in light of the record as a whole.

The government's first argument must fail. "[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accorance with State law." Fed. R. Evid. 601. Washington grants broad discretion to the trial judge in ruling on the competence of expert witnesses. *See Balmer v. Dilley*, 81 Wash. 2d 367, 372, 502 P.2d 456, 459 (1972) (en banc). Admittedly, the Trevinos' expert witness, Paula Behrhorst, was far from being well-qualified to testify. She has never treated a child with cerebral palsy and has not treated many mentally retarded children. *See* 2 Reporter's Transcript (R.T.) at 109. She has never evaluated developmentally disabled children. *Id.* at 116. But these deficiencies in the witness's qualifications go to the *weight* to be given her testimony and not to her ability to testify. *See In re Young*, 24 Wash. App. 392, 397, 600 P.2d 1312, 1315 (1979).

The government's second argument, however, is persuasive. Viewing the record as a whole, the district court's award of attendant care was clearly erroneous. Behrhorst's training was spotty at best; her examination of Sophia was cursory; her conclusions were not well-founded. *See* 2 R.T. at 107-25. For example, after noting that Sophia could ride a tricycle, Behrhorst dismissed that accomplishment, saying that "[t]he fact that she can ride the bicycle, or tricycle, doesn't have any bearing on whether she can feed herself, and dress herself, and toliet [sic] herself." *Id.* at 115. Behrhorst also contends that Sophia, when working, will need ten hours of bilingual attendant care a day. *Id.* at 118-20. The government's expert witness, Marianne Taylor, is the Director of Train-

ing and Nursing for the University of Kansas Children's Rehabilitation Unit. 4 R.T. at 43. She has evaluated between 700 and 1000 handicapped children, with approximately 200 of those children having "mixed" handicaps. *Id.* at 43-44. Taylor, after observing and evaluating Sophia, contended that constant attendant care would be harmful; such care would foster dependence. *Id.* at 49, 51-52. She compared Sophia's condition with the condition of a child who would normally receive ten hours of attendant care a day. The latter type of child, Taylor pointed out, would "not even [be] able to hold their [sic] head up, or roll over independently, is not able to assist at all in feeding [himself], and may in fact need to be fed by a tube." *Id.* at 52-53. The district court's grant of attendant care is wholly unsupported by the record. It shocks our sense of sound judgment. We eliminate this award entirely.

E. *The Pecuniary Award to Sophia*

1. *Choice of a Discount Rate*

The district court applied a -2% discount rate to the pecuniary component of the damage award. It explained its reason for this choice as follows:

> The -2% discount rate was determined by the application of a set formula which assumes as [sic] constant relationship between inflation and discount rates. The differential between the growth rates and the tax-free rate of return has been stable and has averaged more than two percentage points during the 30-year period 1954-1984. To obtain the present value of economic loss using tax-free short-term interest as the appropriate discount rate, a net discount rate of -2% was applied (wage and cost increases ex-

> ceed tax-free interest rates by 2%) and calculated [with] the amounts testified to by the economic expert, Dr. Lowell Bassett.

R.E. at 14. We hold that the district court abused its discretion in applying a negative discount rate to the estimated pecuniary losses. Such a rate relies on assumptions not generally accepted by the courts or economists.

The Supreme Court addressed the discount rate issue in its opinion in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983). Its analysis of the methods of computing damage awards, including the choice of the proper discount rate, need not be repeated except to the extent necessary to reveal our thinking. We quickly point out, however, that the Supreme Court did not approve the use of a negative discount rate even though its survey of the economic and legal literature touched on material that might have suggested it. *See* 462 U.S. at 548 n.30.

We begin by recognizing that awards based on income streams spread over time are usually discounted to present value to account for the fact that a plaintiff, by receiving the money in a lump sum, "up front," will invest the sum and earn additional income from the investment. *See Pfeifer,* 462 U.S. at 536-37; Fitzgerald, *Economic Loss in Wrongful Death: Principles of Evaluation,* 44 Ins. Couns. J. 427, 431 (1977). The discount rate should be based on " 'the best and safest investments.' " *Pfeifer,* 462 U.S. at 537 (quoting *Chesapeake & Ohio Ry. Co. v. Kelly,* 241 U.S. 485, 491 (1916)[1] Were it not for inflation, that simple calculation would end the matter. With inflation, however, dollars received in the future will buy less than would those same dollars if received today. A

net positive discount rate implies that the gains from safe investments exceed the losses induced by inflation—in other words, that the rate chosen to reflect the interest rate on the safest investments over a fixed period of time will be a larger number than the rate chosen to reflect the rate of inflation over the same period of time. Professor Jerome Sherman's analysis of the relationship between government bond yields (the investment factor) and inflation illustrates the point:

> Yields on treasury bonds have stayed slightly ahead of the rate of inflation during the past 32 years [1947-78] (4.4 percent vs. 3.6 percent). This means that the real return on treasury bonds was 0.8 percent.

Sherman, *Projection of Economic Loss: Inflation v. Present Value,* 14 Creighton L. Rev. 723, 732 (1981).

Obviously, it is possible for the true rate of inflation to outstrip the return on the safest investments for some period of time. This would justify for that period of time a negative discount rate. The district court's use of a negative discount rate is based on this possibility.

The district court's choice is flawed, however. First, it relied on an unrepresentative timespan. That period was from 1954 to 1984. R.E. at 14. This span includes the aberrational years 1974-82: years in which oil prices tripled from 1974 to 1979, inflation reached double-digit proportions, and "[r]ecessions in 1974, 1975, 1980, and 1982 mark[ed] the 1974-82 period as the most recession-plagued nine years since the Great Depression." Formuzis & Pickersgill, *Present Value of Economic Loss,* Trial, Feb.

1985, at 22, 23. As one article summarized the state of the economy for the past thirty-five years or so,

> In addition to the upward trend in inflation and interest rates evident in most of the post-1947 period, there has been an increase in the variability about the trend. Between 1947 and 1967, the average yearly inflation rate was 2 percent, and the range between the high and low values was 4.6 percent. For interest rates on long-term government securities, the corresponding figures were 3.37 average and a range of 2.6 percent. In the following sixteen-year period, however, the average figures for inflation and interest rates were 7.27 percent and 7.93 percent while the ranges were 10.5 percent and 7.62 percent respectively. In fact, the interest rate on ten-year government bonds fluctuated nearly as much in 1981 alone as it did for the entire period 1947 to 1967. This volatility indicates that forecasters have had a more difficult assignment in recent years and that forecast errors, which have been large in recent years, can be expected to remain that way.

Mead, *Calculating Present Value,* Trial, July 1984, at 16, 18. The truth of this observation is borne out when one examines the period 1926-1981, in which the average annual inflation rate was around 3 percent. R. Ibbotson & R. Sinquefield, *Stocks, Bonds, Bills, and Inflation* 15 (1982 ed.).

We cannot deny history, nor can history provide an always reliable basis for predicting the future. However, we can base our estimates on long time periods that will diminish the effect of shorter aberrational periods. Fluctuations that are great for a short time span are less dramatic, and skew results less, when they are seen as part of a longer period. We have no confidence in the ability of experts, the district court, or this court, to predict in-

flation or interest rates over the period of Sophia's life other than by extrapolating from the past.

The district court must also select an accurate measure of historical inflation as the basis for its prediction of future inflation. Here, the district court used the historical increase in wages and medical costs. Supplemental Record Excerpts at 48. But this gives the illusion of greater inflation, because some portion of wage increases is not due to inflation:

> Because the growth rate of wages includes a component attributable to pay increases due to increased education, age and maturity, and increases in productivity, as well as a component attributable to inflation, the difference between the interest rate on a secure investment and the rate of growth of wages *understates* the real interest rate by whatever proportion of the growth rate of wages is not attributable to inflation.

Sauers v. Alaska Barge & Trasp., Inc., 600 F.2d 238, 246 n.15 (9th Cir. 1979). The district court might have supposed that the historical rise in wage rates was a proper measure of inflation for the purpose of calculating a discount rate to be applied to the wage portion only of Sophia's award, because Sophia deserved to be compensated for future increases in her wages due to her projected increased productivity, as well as for increases in her wages due to projected inflation. But *Pfeifer* denies that supposition. A plaintiff may be compensated for projected future increases in his wages due to increases in his productivity if he proves that he would have been likely to receive wage increases by reason of his increased productivity. 462 U.S. at 534-36. Because Sophia made

no such showing, the district erred when it used the historical rise in wages as a measure of inflation for the purpose of calculating the discount rate for the lost wage portion of Sophia's award. Furthermore, the rate of increase in wages may not be the same as the rate of increase in medical costs over the same period. For this reason, the measure of inflation for the purpose of calculating the discount rate to be applied to the medical expense portion of Sophia's award may be different than that employed in fixing the discount rate applicable to the lost wage portion of her award.

Pfeifer's discussion of discount rates technically is only an interpretation of section 5(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). *See* 462 U.S. at 547. But the general discussion of alternative methods of calculating discount rates is extensive. The Court mentions several options:

> 1. Calculate the lost income stream by excluding the effects of inflation and the "real" interest rate by fixing the difference between the market rate of interest and the anticipated rate of inflation, *id.* at 541-42, 548;
>
> 2. Calculate the size of the lost income stream by including the effects of inflation and discounting by the market interest rate, *id.* at 543, 547-48; and,
>
> 3. Calculate the value of pecuniary damages by employing a zero discount rate (the total offset approach), *id.* at 544-46, 549-50.

The last option (the total offset approach) was considered unacceptable as a uniform method to calculate dam-

ages, although it could be stipulated to by the parties, or applied by the trial court in an appropriate case. *See id.* at 550-51. After examining a plethora of economic studies, the Court concluded as to the "real" interest rate option that: "Although we find the economic evidence distinctly inconclusive regarding an essential premise of those approaches, we do not believe a trial court . . . should be reversed if it adopts a rate between 1 and 3% and explains its choice." *Id.* at 548-49 (footnote omitted). Obviously a decision interpreting section 5(b) of the LHWCA is not binding in an FTCA case; however, the Court's guidance on the issue of economic predictions and discount rates cannot be disregarded. We accept this guidance and choose to regard it as controlling in this case. In reliance on *Pfeifer,* and in the absence of Washington state law to the contrary, we decline to embrace a negative discount rate on the basis of this record.

We do not hold, however, that any discount rate above 3% or below 1% is impermissible. Supported by credible expert testimony, a court could certainly adopt a different rate. *Cf. Culver v. Slater Boat Co.* (*Culver II*), 722 F.2d 114, 121-22 (5th Cir. 1983) (en banc) (requiring courts to use a below-market rate calculation and permitting courts to use a -1.5% discount rate if supported by expert opinion). We do hold, however, that it is impermissible to select a time period over which to compare inflation and interest rates that provides a decidedly aberrational result. We also point out that is it impermissible either (1) *to exclude* the effects of inflation in determining the size of the lost income stream and employ a discount rate equal to the market rate of interest, or (2) *to include* the effects of inflation in determining the size of the lost

income stream and employ a discount rate measured by the difference between the market rate of interest and the rate of inflation. The former denies the injured party any adjustment for inflation while making available such adjustment to the party deemed responsible for the injury. The latter, on the other hand, provides to the injured party an adjustment for inflation in determining the size of the lost income stream and denies to the party deemed responsible for the injury any benefit of that adjustment in determining the proper discount rate. *See Pfeifer,* 462 U.S. at 538-52 *passim.* Put more succinctly, the former accords the party deemed responsible for the injury a "double benefit," while in the latter the "double benefit" passes to the injured party. Neither party is entitled to a "double benefit."

Finally, we point out that the choice of an interest rate yield on Sophia's lump sum award, or for other purposes in fixing the final amount of the award for the loss of earning capacity, is not dictated by the manner in which taxes are treated. The yield of tax-free securities enjoys no special status. That yield merely indicates what a yield would be to an investor who is strongly averse to both risk and taxes. No sensible investment counsellor would advise Sophia to invest the entire lump sum in tax-free securities. Nor is it probable that she will do so. For these reasons the use of the yield of tax-free securities to arrive at the "real rate" of interest is suspect. The tax-free rate of interest is substantially below that yielded by securities not enjoying that privilege. Its use, when coupled with a period of unrepresentative high inflation, as was done in this case, yields an unnaturally low discount rate. This should be avoided on remand.

2. *Treatment of Taxes*

The necessity to treat inflation consistently in fixing the size of the future income stream and the proper discount rate suggests a somewhat similar problem in connection with taxes. Sophia's economist made certain adjustments in his calculations with respect to taxes that would have been imposed on Sophia's earnings had she not been injured and taxes that would be paid with respect to the earnings the lump sum would earn. The purpose of these adjustments was to make certain that Sophia did receive after taxes in the future what she would have received after taxes had she not been injured.

These adjustments must be consistent. That is, if Sophia's future earnings are reduced by taxes, as is permitted by *Norfolk & Western Railway Co. v. Liepelt,* 444 U.S. 490 (1980), then the interest yield of the lump sum award should be reduced by taxes. *Id.* at 495. On the other hand, if Sophia's future earnings are not reduced by taxes, then the interest yield also should not be reduced for taxes. When both the earnings and the interest yield are adjusted for taxes, the earnings adjustment reduces the amount of the lump sum while the interest yield adjustment increases it. When neither is adjusted for taxes, the absence of an adjustment to earnings increases the lump sum, while the absence of an adjustment to interest yield diminishes the after tax value of the lump sum.

F. *Conclusion*

The award of $2.0 million to Sophia for her nonpecuniary damages is reduced to $1.0 million. The award of

$200,000 to Sophia's parents as a unit on each of two grounds—for the loss of love and companionship and for injury to the parent-child relationship—is reduced to $50,000 per ground, a total of $100,000. The award of $1,757,667 for Sophia's attendant care is eliminated. We remand for the recalculation of Sophia's pecuniary loss in accordance with the Part II.D. of this opinion.

MODIFIED IN PART, REVERSED IN PART, AND REMANDED.

FOOTNOTE

1. The reason that risk-free investments are preferred to more remunerative but riskier investments is that the plaintiff should not be faced with the burden of becoming a full-time broker merely to safeguard his award.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUBEN TREVINO, et al.,	)	
	)	
Plaintiffs-Appellees,	)	No. 85-4136
	)	
v.	)	DC#
	)	CV-84-179-JET
UNITED STATES	)	
OF AMERICA,	)	ORDER
	)	
Defendant-Appellant.	)	
	)	

(Filed Jan. 27, 1987)

Before: WRIGHT, SNEED, and SCHROEDER, Circuit Judges.

The panel unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

No. 86-1720 (7)

In the Supreme Court of the United States

OCTOBER TERM, 1986

RUBEN TREVINO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
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Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1720

RUBEN TREVINO, ET AL., PETITIONERS

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals misapplied the clearly-erroneous standard of appellate review in reversing and modifying the district court's award of economic and non-economic damages under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*

1. Petitioners brought this action under the FTCA in the United States District Court for the Western District of Washington, alleging that they and their daughter, Sophia, had been injured by negligent obstetrical care provided at the Madigan Army Medical Center in Tacoma, Washington. Specifically, petitioners asserted that government doctors had negligently failed to diagnose and to treat appropriately

an abnormality in petitioner Rachel Trevino's pregnancy that ultimately caused her infant daughter Sophia to suffer serious physical and mental impairments at birth. Petitioners sued on their own behalf and as legal guardians for Sophia.

The district court held that the United States had been negligent under the applicable standards of the law of Washington and that the negligence proximately caused Sophia to sustain mental retardation, cerebral palsy, and other serious injuries. The court awarded petitioners a total of $6.3 million in economic and non-economic damages. The award consisted of $2 million in non-economic damages for Sophia, $400,000 in non-economic damages for Sophia's parents (for loss of love and companionship and for injury to the parent-child relationship), and approximately $3.9 million in economic damages for Sophia's lost earnings and medical care. In calculating the economic damages, the district court used a rate of negative two percent in discounting future losses to present value. Pet. App. 3-19.

2. On appeal, the government did not contest liability but challenged several aspects of the district court's award of damages. The court of appeals reversed in part and modified in part. Applying a clearly-erroneous standard of review,[1] the court reduced the awards of non-economic damages as ex-

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[1] The court of appeals noted that FTCA damage awards are reviewed for clear error and explained that a damage award is clearly erroneous if "after a review of the record, [the reviewing court is] 'left with the definite and firm conviction that a mistake has been committed' " (Pet. App. 22 (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948), and citing *Shaw* v. *United States*, 741 F.2d 1202, 1205 (9th Cir. 1984)).

cessive, eliminated a part of the economic damage award as clearly erroneous, and remanded for reconsideration of the appropriate discount rate (Pet. App. 36).

With respect to the non-economic damage awards, the court of appeals explained that excessiveness is a question of Washington state law and that Washington considers such awards excessive if the amount shocks the court's sense of justice or sound judgment and it appears that the trial judge was swayed by passion or prejudice (Pet. App. 22-23). The court pointed out that Sophia Trevino "will be able to attain a fourth-grade reading and writing level, * * * will be able to work during her adult life, * * * has been described as 'a delightful little child who obviously expects to be responded to positively by others,' * * * [and] is 'imaginative in her play'" (*id.* at 24 (citations omitted)). The court then noted that, in *Shaw* v. *United States*, 741 F.2d 1202 (1984), a recent case applying Washington law and involving a child more severely impaired than Sophia Trevino, the Ninth Circuit had reduced the non-economic damages to $1 million for the child and to $50,000 for the child's parents for the same types of non-economic damages sought by Sophia's parents, who "will be able to enjoy her company to a far greater degree than would" the parents in *Shaw*. Pet. App. 23-25. The court reduced Sophia's non-economic damage award from $2 million to $1 million and reduced her parents' award from $400,000 to $100,000 (*ibid.*).

With respect to the economic damage award, the court first reversed the award of approximately $1.8 million for the life-time services of a home attendant. Petitioners offered the testimony of an expert witness in support of the need for such care, but the testi-

mony of petitioners' expert "was spotty at best; her examination of Sophia was cursory; her conclusions were not well-founded" (Pet. App. 26). By contrast, the government's expert on the issue, the Director of Training and Nursing for the University of Kansas's Children's Rehabilitation Unit, had evaluated between 700 and 1,000 handicapped children and soundly based her testimony on observation and evaluation of Sophia (*id.* at 26-27). After noting that the government's expert had testified that attendant care could actually harm Sophia by fostering dependence, the court concluded that the district court's provision for attendant care was wholly unsupported by the record. The court therefore eliminated the award in its entirety (*id.* at 27).

The court next held that the district court abused its discretion in choosing a negative two percent discount rate for determining the present value of future economic damages—a choice based on the assumption that, on average, inflation would exceed reasonable investment returns by that amount (Pet. App. 27, 32-33). First, the district court projected future inflation from a time period that was too short and gave undue weight to recent periods of unusually high inflation (*id.* at 29-31). Second, the district court used the rate of wage growth as a measure of inflation; but wage growth reflects both inflation and increases in worker productivity, and there was no evidence at all supporting compensation for increasing productivity in this case (*id.* at 31-32). Finally, the discount rate may have been distorted by the district court's reliance on the low interest rate yielded by tax-free securities, which would not be the sole investment made by a prudent investor (*id.* at 34).

For those reasons, the court remanded the case to the district court for recalculation of the present value of economic damages (Pet. App. 36). The court of appeals subsequently denied requests for panel and en banc rehearing (*id.* at 37).

3. The fact-bound decision of the court of appeals is correct and is wholly in accord with the decisions of this Court and of other courts of appeals. Review by this Court is plainly unwarranted.

a. Petitioner first suggests (Pet. 4-8) that the court of appeals departed from the clearly-erroneous standard of appellate review and that disparities in results of various appellate courts' review of damage awards require this Court's attention. Putting to one side petitioners' particular allegations of error (which, as shown below, are without merit), these general contentions are patently meritless.

Application of the clearly-erroneous standard of review hardly forbids (indeed, it would seem to require) a court of appeals to examine the record carefully to determine whether the evidence as a whole leaves the firm conviction that the district court's findings of fact were wrong. *Anderson* v. *Bessemer City*, 470 U.S. 564, 573 (1985); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Contrary to petitioners' accusation of transcript "editing" (Pet. 5), the court of appeals in this case properly reviewed the evidence and reversed findings of fact only where, for the reasons it set forth, it was left with the definite impression that the trial court had erred. Moreover, there is no problem of inter-circuit or intra-circuit disparity in appellate review that calls for this Court's intervention. All of the cases cited by petitioners endorse the same standard of review, and all agree that the adequacy or exces-

siveness of damages in an FTCA action is determined by applicable state law. See, *e.g.*, *Jastremski* v. *United States*, 737 F.2d 666, 672 (7th Cir. 1984). Among decisions arising under the law of Washington, which applies here, petitioners have wholly failed to show any disparities between comparable cases; and indeed, the court of appeals' reliance on its recent *Shaw* decision was plainly correct. In any event, review by this Court on a question of Washington law is unwarranted.

b. Petitioners challenge (Pet. 9-15) the court of appeals' reduction of the non-economic damage awards on the grounds that the court failed to account for Sophia Trevino's long life expectancy and that the court's ruling is inconsistent with certain comparable decisions under Washington law. These challenges are without merit.

The court of appeals, recognizing the intangible nature of pain, suffering, and other non-pecuniary injuries, followed the proper course in reviewing the award of non-economic damages. It first examined the totality of circumstances that will determine, over time, Sophia's quality of life, her capacity for social interaction, and the effects on her parents of her injuries; it then compared the awards at issue here to the damage award in the most recent case under Washington law involving comparable facts, namely, the *Shaw* case (Pet. App. 23-25).[2] There is no basis

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[2] Washington law permits damages for mental anguish, pain and suffering, and the loss of a capacity to lead a normal life: It also permits the parents of an injured child to recover non-economic damages for loss of companionship, loss of the child's mutual society and protection, and grief, mental anguish, and suffering. See Pet. App. 23-25; *Parris* v. *Johnson*, 3 Wash. App. 853, 860 n.2, 479 P.2d 91, 95 n.2 (1970); *Hinzman* v. *Palmanteer*, 81 Wash. 2d 327, 501 P.2d 1228 (1972).

for petitioners' contention that the court ignored that fact, which was plainly set out among the district court's findings of fact (Pet. App. 15) and which, as the district court's findings show (*id.* at 14, 15, 17), is not, in any event, the sole or even dominant determinant of non-economic losses. Moreover, although Sophia Trevino's injuries were actually less severe than those suffered by the child in the *Shaw* case (though Sophia's life expectancy was somewhat longer), the court of appeals in this case awarded the same non-economic damages to Sophia as it had awarded to the *Shaw* child ($1 million) and greater non-economic damages to Sophia's parents than it had awarded in *Shaw* ($100,000 here; $50,000 in *Shaw*).

Similarly, petitioners have not shown that the court of appeals erred in relying on *Shaw* rather than the two decisions they point to (Pet. 13-14). Petitioners have wholly failed to show that those decisions present facts closer to those here than does the *Shaw* decision. In any event, the figures petitioners give for the damage awards in *Thompson* v. *Community Memorial Hospital, Inc.*, No. 81-2-16549-4 (Wash. Super. Ct. 1985), are figures for a jury award that included both economic and non-economic damages and that was not reviewed for excessiveness (because the case settled). See U.S. Br. App. 8a in the Ninth Circuit in this case. And in *Dearing* v. *United States*, No. C-82-654-SPM (E.D. Wash. May 12, 1986), appeal pending on other grounds, No. 86-4232 (9th Cir.), the district court award of $1,250,000 for non-economic damages is not nearly as shocking to the sense of justice or indicative of a finder of fact " 'swayed by passion' " (Pet. App. 22 (quoting *Shaw*, 741 F.2d at 1209)) as the $2 million award by the district court here.

c. Contrary to petitioners' next contention (Pet. 15-22), the court of appeals, in overturning the damage award for attendant care, neither failed to review all the evidence nor improperly substituted its judgment for that of the trial court. The need for lifetime attendant care turned on a dispute between petitioners' expert and the government's expert. The court of appeals properly concluded that the relatively poor qualifications of petitioners' expert and her "cursory" examination of Sophia Trevino must severely diminish the evidentiary weight of her testimony (Pet. App. 26). The government's evidence, the testimony of a witness with manifestly superior qualifications, training, education, and experience,[3] showed that attendant care would be an impediment to Sophia's gaining maximum possible independence and necessarily carried more weight. "Viewing the record as a whole" (*ibid.*), the court of appeals correctly concluded that the district court's finding of a need for attendant care was clearly erroneous.

d. Finally, petitioners' challenge (Pet. 22-28) to the court of appeals' rejection of the district court's choice of a negative two percent discount rate is likewise meritless. Consistent with *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523 (1983), and *Culver* v. *Slater Boat Co.*, 722 F.2d 114, 121-122 (5th Cir. 1983) (en banc), the court of appeals left the district court leeway to choose among several acceptable methods in discounting future losses to pres-

[3] Plaintiff's expert had little experience in nursing patients with cerebral palsy or developmental disabilities and no special training in that field (II Tr. 108-110). The government's expert had a graduate degree in nursing, over ten years of experience in children's rehabilitation, and had performed over 700 evaluations of handicapped children (IV Tr. 43-45).

ent value; the court also admitted the possibility of a negative discount rate where supported by credible expert testimony, and held only that it could not "embrace a negative discount rate on the basis of *this* record" (Pet. App. 32-33 (emphasis added)). In particular, the court of appeals correctly concluded, among other things, that the district court had no evidentiary basis for taking worker-productivity increases into account in this case and had not adequately justified its use of the period 1954-1984, which was unusually inflationary when seen from a longer perspective, in projecting the future "net" interest rate (the market interest rate minus inflation). Moreover, in finding the district court's selection of a negative two percent discount rate inadequately supported by evidence, the court correctly relied on the fact that that rate fell well outside the range of one to three percent that this Court, after an exhaustive review of the economic literature, found to be generally supported by sound economic evidence in *Jones & Laughlin Steel Corp.*, 462 U.S. at 548-549. The court of appeals' remand for new evidence does not warrant this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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